APR 22 1974
MICHAEL RODAK, JR., CLE

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

NO. 73-1150

RONNIE WEEDON,

Petitioner

VS.

THE STATE OF TEXAS,

Respondent

BRIEF OF RESPONDENT IN OPPOSITION *TO PETITION FOR WRIT OF CERTIORARI*

JOHN L. HILL
Attorney General of Texas

LARRY F. YORK
First Assistant Attorney General

JOHN W. ODAM
Staff Legal Assistant Attorney General

JOE B. DIBRELL
Assistant Attorney General

BEN M. HARRISON
Assistant Attorney General

Attorneys for Respondent

P.O. Box 12548, Capitol Station
Austin, Texas 78711

SUBJECT INDEX

Page

INDEX OF AUTHORITIES ii

QUESTION PRESENTED 2

STATEMENT OF THE CASE 2

ARGUMENT 2

CONCLUSION 16

CERTIFICATE OF SERVICE 17

INDEX OF AUTHORITIES

Pages

Ronnie Weedon v. State of Texas, 501 S.W. 2d 336 (Tex. Crim. 1973) 2, 8, 11, 13, 15

The State of Texas v. Ronnie Weedon, No. 13,297, 99th District Court of Lubbock County, Texas, January term, 1972 2

Jackson v. Denno, 378 U.S. 368, 84 S. Ct. 1774, 12 L. Ed. 2d 908 (1964) 3, 10, 12, 15

Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L. Ed.2d 694 (1966) 3, 8, 9, 12, 14, 15

Orozco v. Texas, 394 U.S. 324, 89 S. Ct. 1095, 22 L.Ed. 2d 311 (1969) 3, 11

Turner v. United States, 387 F.2d 333 (5 Cir. 1968) 11

Davis v. Beto, 423 F.2d 633 (5 Cir. 1970) 12

United States v. Nielsen, 392 F.2d 849 (7 Cir. 1968) 12, 13

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-1150

RONNIE WEEDON,

Petitioner

VS.

THE STATE OF TEXAS,

Respondent

BRIEF OF RESPONDENT IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

NOW COMES John L. Hill, The Attorney General of Texas, for Respondent, and in opposition to the petition for a writ of certiorari in the above entitled case would show the Court the following:

QUESTION PRESENTED

Petitioner was convicted and sentenced for the offense of murder with malice with due process of law as provided in the Fourteenth Amendment to the Constitution of The United States.

STATEMENT OF THE CASE

Petitioner seeks a Writ of Certiorari to review an order of the Court of Criminal Appeals of Texas, November 7, 1973, affirming the judgement of conviction of Petitioner for murder with malice. *Ronnie Weedon v. State of Texas,* 501 S.W.2d 336.

ARGUMENT

The record on appeal reflects that in Cause No. 13,297, *The State of Texas vs. Ronnie Weedon,* in the 99th District Court of Lubbock County, Texas, January term, 1972, Ronnie Weedon was found guilty of murder with malice aforethought.

Weedon pleaded not guilty to the charge contained in the indictment. He was represented by employed counsel of his own choice. A jury of twelve heard the evidence submitted, and returned the following verdict:

> "We, the Jury, find the Defendant guilty of murder with malice aforethought."

On the 24th day of February, A.D., 1972, the jury assessed the punishment of Defendant at confinement in the State Penitentiary for a period of ten (10) years.

Petitioner appealed to the Court of Criminal Appeals of Texas and his conviction was affirmed by the Court November 7, 1973.

Petitioner contends:

(1) That he was deprived of due process of law by failure of the trial court to conduct a *Jackson v. Denno* type hearing, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed. 2d 908 (1964), out of the jury's presence, on the admissibility of the Petitioner's oral statement-confession when same did not comply with *Miranda vs. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d 694 (1966).

(2) That he was deprived of due process of law by the trial court admitting Petitioner's oral statement-confession into evidence when same was in violation of *Miranda vs. Arizona*, supra, and *Orozco vs. Texas*, 394 U.S. 324, 89 S.Ct. 1095, 22 L.Ed.2d 311 (1969).

The Record on Appeal shows the following:

On the night of September 28, 1970, George McGann, Mike Meshell, and Marshall Perry were shooting pool and drinking whiskey at the Circle Club in Lubbock, Texas. Around midnight they put in a telephone call to the home of Petitioner Ronnie Weedon who lived outside of the city limits in Lubbock County. They went out to Petitioner's residence and had a few more drinks

with Petitioner and a woman who was there at the place, Frances Golden.

George McGann started knocking over his drinks, and Petitioner got him to bed, noticing at the time that McGann was carrying a .38 caliber five shot revolver.

Mike Meshell was drinking and Petitioner got him to bed. There is some conflict in the testimony about what happened after that, but it is certain that a disturbance occurred, Mike Meshell and George McGann got up, an altercation took place during which Mike Meshell was shot two times with the .38 caliber revolver, and George McGann was shot three times with the .38 and once through the heart with a .45 automatic pistol. The .45 caliber slug was found under the body of George McGann (Stipulation, S.F. p. 254).

Texas Ranger James R. Singleton testified that on September 29, 1970, he received a telephone call at about 6:30 (in the morning) "that there had been an incident at the resident [sic] of Mr. Ronnie Weeden [sic]at 90th and S and was requested to assist the Sheriff's Office in their investigation." (p. 64) He arrived at the residence about 10 minutes until 7:00. He knew it to be the residence of Ronnie Weedon, who he had known on previous occasions. The door was open, he walked in, and there were other officers present. He observed Mr. Weedon standing and spoke to him.

Ranger Singleton observed two bodies on the floor and said he knew only one of them — George McGann. McGann was laying on his back, and appeared to be dead. The other party was identified to him as Mike Meshell.

Singleton testified that, at that time the investigation had not centered on any individual. He said that no one in the house was in custody and no part of his investigation had centered on Ronnie Weedon as to any criminal act. (p. 120)

Mr. Singleton was approached by Petitioner Ronnie Weedon. (p. 119-121)

Ranger Singleton testified on direct examination:
"Q. Who was the first one, you or Mr. Weeden [sic], to say anything right there in that room?
A. Mr. Weeden. [sic]
Q. Okay. What is the first thing he said to you then?
A. "I would like to talk to you.' " (p. 127)

"Q. Okay. What did you do then, did you talk to him right there in that room?
A. No. I stepped to another room.
Q. Why did you step to another room?
A. Mr. Weeden [sic]desired this in private.
Q. Who desired this?
A. Mr. Weeden. [sic]
Q. Did he tell you that?
A. Yes.
Q. What did he tell you?
A. His exact words, 'I would like to talk to you in private.'
Q. Did he say where any place in private would be?
A. No.

Q. What did Mr. Weeden [sic]do then please?
A. Mr. Weeden [sic] and I stepped to another room." (p. 127)

"Q. What was the first thing that was said, if anything, when you reached the room that you pointed out.
A. Mr. Weeden [sic] related that he could clear this matter up and say specifically what had happened.
Q. Okay. What did you do then?
A. I told him that he didn't have to make any statements and that he could have an attorney if he so desired.
Q. What did he say?
A. He asked, 'would I need one'?
Q. Okay. What was said?
A. I asked if he had contacted an attorney.
Q. What did he say?
A. He said, 'Yes'.
Q. And did he say anything else about an attorney?"

At p. 129:
"A. He said that he had attempted to contact Mr. Phil Brummett and was not able to do so, and had contacted an attorney in Houston.
Q. Did you ask him anything else at that very point?
A. No.
Q. Did he say anything then?
A. Yes.
Q. What was that?
A. He said that during his excitment [sic] that he had shot and killed George McGann, possibly with both guns.
Q. Okay. Were you and he the only — you and Ronnie Weeden [sic] the only ones in that room that you pointed to?
A. At that time, yes.
Q. Did you leave that room — when did you leave that room?
A. After Mr. Weeden [sic] did.
Q. Okay. Where did you go then?
A. I assisted the other officers in the search of the

residence and general investigation.
Q. Okay. Did you continue your general investigation, is that what you testified to?
A. Yes."

Petitioner Ronnie Weedon testified at his trial that he shot George McGann in self defense in a struggle for McGann's .38 revolver, after McGann had shot Mike Meshell and threatened the others, stating that he did not want to leave any witnesses. (p. 475-525).

The State contended that Petitioner's claim of self defense was not true. The State used the testimony of Jim Cooper, who was an investigator for the Lubbock County Sheriff's Department at the scene. Cooper testified that when the ambulance attendant rolled George McGann's body over, a bullet rolled from under the shirt of McGann. (p. 292) Cooper testified: "[O]n a piece of ceramic tile I found an area that was visible with the eye, and I thought that very possibly this was where the bullet could have struck the floor through the body. . . . " (p. 294)

The State used the testimony of a chemist employed by the Texas Department of Public Safety, Joe Ronald Urbanowski, who testified as to the bullet markings on the shirt worn by George McGann. (State's Exhibit No. 14) Mr. Urbanowski testified:

> "It is my opinion that on the two holes in the back of the shirt that the muzzle of the gun would be a distance, again, to five feet when one or both of the shots were fired that produced these two holes in

the back of the shirt." (p. 330)

"Because of the proximity of these holes the powder could have come from one or both of the shots, and from this one shot could have produced all the powder thus being a distance from three to five feet, and the other shot not producing any residue on the shirt would have had to been a distance greater than five feet, which is the distance at which both of these pistols stopped depositing powder on the fabric." (p. 330-31)

"Okay. The muzzle of the pistol would have to be at a distance from five feet from the place at the back of the shirt when the shot was fired to leave no powder — this impression here." (p. 331)

"Q. Was there any holes on there that could have been made by bullets shot closer than three feet from the shirt?
A. No, sir." (p. 333)

The State contended that the evidence did not support Petitioner's claim of a struggle at close range with George McGann.

The Court of Criminal Appeals of Texas in *Weedon v. State*, supra, concluded that the evidence is sufficient to support the conviction.

Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d 694 (1966), does not apply in this case because at the time Petitioner volunteered his statements to Ranger Singleton, Petitioner was not in custody. He was not even the subject of an investigation. Petitioner's statement was volunteered to Ranger Sing-

leton and not in response to a question.

The opinion of the Court in the *Miranda* case, supra, states:

> "Our holding will be spelled out with some specificity in the pages which follow but briefly stated it is this: the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." p. 444.

> "The constitutional issue we decide in each of these cases is the admissibility of statements obtained from a defendant questioned while in custody or otherwise deprived of his freedom of action in any significant way." p. 445.

> "In dealing with statements obtained through interrogation, we do not purport to find all confessions inadmissible. Confessions remain a proper element in law enforcement. Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence. The fundamental import of the privilege while an individual is in custody is not whether he is allowed to talk to the police without the benefit of warnings and counsel, but whether he can be interrogated. There is no requirement that police stop a person who enters a police station and states that he wishes to confess to a crime, or a person who calls the police to offer a confession or any other statement he desires to make. Volunteered statements

> of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today." p. 478.

Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964), does not apply in this case because in the *Jackson* case the Petitioner made his statement after being questioned at the hospital by a detective, and by an Assistant District Attorney in the presence of police officers and hospital personnel, while Jackson was in the hospital after having been shot and administered drugs. Jackson said: "Look, I can't go on." But in response to further questions admitted shooting the policeman. The interview was completed at 4 a.m.

In this case, Petitioner requested Ranger Singleton to go into the next room with him, and volunteered his statement. He was not in custody, or even the subject of the investigation.

In *Jackson v. Denno,* supra, the trial court submitted the issue about the voluntariness of the confession along with the other issues in the case to the jury. The Court in *Jackson v. Denno* said:

> "In our view, the New York procedure employed in this case did not afford a reliable determination of the voluntariness of the confession offered in evidence at the trial, did not adequately protect Jackson's right to be free of a conviction based upon a coerced confession and therefore cannot withstand constitutional attack under the Due Process Clause of the Fourteenth Amendment." p. 377.

In the *Weedon* case here there was no need for the determination of the voluntariness of Petitioner's statement in a separate hearing.

In *Orozco v. Texas*, 394 U.S. 324, 89 S.Ct. 1095, 22 L.Ed. 2d 311 (1969), the opinion of the Court states:

> "At about 4 a.m. four police officers arrived at petitioner's boardinghouse, were admitted by an unidentified woman, and were told that petitioner was asleep in the bedroom. All four officers entered the bedroom and began to question petitioner. From the moment he gave his name, according to the testimony of one of the officers, petitioner was not free to go where he pleased but was 'under arrest.' " p. 1096.

In this case Petitioner was not under arrest, and was not even under investigation when he invited Officer Singleton into the next room and made voluntary statements to him. As pointed out by the Court of Criminal Appeals in *Weedon v. State*, supra, Petitioner was not under arrest or under custody, nor was he deprived of freedom of movement in any significant manner at the time of the above conversation. This conversation occurred on September 29, 1970, and Appellant was not arrested until March 15, 1971.

Petitioner quotes extensively from *Turner v. United States*, 387 F.2d 333 (5 Cir. 1968). However, the *Turner* case concerned oral admissions made and handwriting specimens given by the Defendant while under arrest or

detention. The *Turner* case involved a question of "in-custody interrogation" not present in this case.

Petitioner argues that *Davis v. Beto*, 423 F.2d 633 (5 Cir. 1970), supports his contention that a separate hearing should have been held outside of the presence of the jury as to the admissibility of Petitioner's volunteered statements to Ranger Singleton. However, the opinion of the Court in *Davis v. Beto*, a habeas corpus proceeding by a state prisoner, states:

> "The case must therefore be remanded to the district court for a determination first of the exhaustion of state remedies question. If the petitioner has properly exhausted his state remedies, then the district court should consider the Jackson v. Denno issue." p. 635

In *United States v. Nielsen*, 392 F.2d 849 (7 Cir. 1968), cited by Petitioner on pages 15 and 16 of his brief, the Court said in its opinion:

> "At approximately 1 a.m. on October 7, 1966, the defendant was arrested in his home in Lisle, Illinois. The arresting F.B.I. agent testified before the jury that he warned the defendant while still at his home of his rights to remain silent and to have the assistance of counsel (as required by the Supreme Court in Miranda v. State of Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d 694 (1966)). The agent further testified that he again warned the defendant of these rights when they reached the F.B.I. office and the defendant himself read a statement of these rights which were contained in a 'waiver of rights' form. According to the agent, the

> defendant then said: 'I am not going to sign this document. I have an attorney, *** and I am not signing anything, including this form, until I have occasion to talk to Mr. Wolfson.' The agent testified that he then offered to let the defendant call his attorney, but the defendant declined, saying, 'it could wait until later on in the morning.' The agent continued, 'He said, however, that we could proceed with the questioning.' Following this statement, the agent said that he asked the defendant five questions concerning his knowledge about J.P. Suit and the car. To all questions, the defendant gave negative answers." p. 851.

In the *Nielsen* case, the Defendant was under arrest and custodial interrogation. The holding of the Court in the *Nielsen* case does not apply in this case because the facts are entirely different.

In regard to the testimony of Ranger Singleton relating to his conversation with Petitioner when arriving at Petitioner's home where he had gone to assist local officers in the investigation, the Court of Criminal Appeals of Texas in *Weedon v. State*, supra, said:

> "... appellant complains of the testimony of Ranger Singleton relating to his conversation with appellant when arriving at appellant's home where he had gone to assist local officers in the investigation. At the moment of arrival the investigation had not centered on anyone and no one was in custody. He first spoke to the local officers who were present at the residence, observed two dead bodies, and then was approached by appellant, whom he knew. Appellant first said, 'I would like to talk to you in private.' The two of them then stepped into another

room and appellant said he 'could clear this matter up'. At that juncture the ranger told appellant 'he didn't have to make any statement and he could have an attorney if he so desired.' Appellant asked, 'Would I need one?" The ranger asked if he had contacted an attorney. Appellant said he had tried to contact Mr. Phil Brummett (a local lawyer) and was unable to do so and had contacted a lawyer in Houston. According to the ranger, without further questioning appellant stated at that time, 'that during his excitement he had shot and killed George McGann [the deceased] possibly with both guns.' After this conversation appellant left the room and the ranger continued in the investigation.

"Before discussing the admissibility of the above statements, we observe that unlike the normal case the testimony did not stop at this juncture; rather appellant was able to develop on cross-examination of Officer Singleton for approximately 150 pages his entire defensive theory of self-defense.

"We return to the questioned testimony and conclude that appellant was not under arrest or in custody, nor was he deprived of freedom of movement in any significant manner at the time of the above conversation. This conversation occurred on September 29, 1970, and appellant was not arrested until March 15, 1971. It, therefore, follows that these statements were not admitted in violation of the terms of Art. 38.22, Vernon's Ann. C.C.P., or the holding in *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694." pp. 337-38.

Petitioner argues in his petition that *Miranda* is applicable, and yet he cannot bring Petitioner's statement within the requirements of the *Miranda* case. The

Court said that the *Miranda* warnings are to be given after the subject is in custody. In this case, however, Petitioner was not in custody and was not even under investigation when he invited Ranger Singleton into the next room and volunteered what he refers to as "Petitioner's Oral Statement-Confession."

Petitioner argues that a separate *Jackson v. Denno* type hearing should have been held anyway. There was no justification for a *Jackson v. Denno* type hearing in this case because there was nothing to indicate that Petitioner was in custody or that his statement was involuntary.

Petitioner is in no position to complain of the trial court admitting his "oral statement-confession" in to evidence because as pointed out by the Court of Criminal Appeals of Texas in *Weedon v. State*, supra, Petitioner developed his entire defensive theory of self-defense on cross-examination of Officer Singleton, for approximately 150 pages, in the Record.

Petitioner has not been deprived of due process of law.

CONCLUSION

Petitioner has been tried and convicted according to due process of law and his constitutional rights have not been violated. Therefore, the petition for writ of certiorari should be denied.

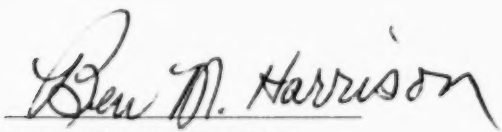
Respectfully submitted,

JOHN L. HILL
Attorney General of Texas

LARRY F. YORK
First Assistant Attorney General

JOHN W. ODAM
Staff Legal Assistant Attorney General

JOE B. DIBRELL
Assistant Attorney General



BEN M. HARRISON
Assistant Attorney General

Attorneys for Respondent

P.O. Box 12548, Capitol Station
Austin, Texas 78711

CERTIFICATE OF SERVICE

I, Ben M. Harrison, a member of the Bar of the Supreme Court of the United States, do now hand in my appearance in the Supreme Court of the United States in the above mentioned cause on behalf of the Respondent; I do therefore certify that a copy of the foregoing Brief has been forwarded by the United States Mail, first class, certified and postage pre-paid on this the 18th day of April, 1974, to: Marvin O. Teague, 999 State National Building, 412 Main Street, Houston, Texas 77002, Attorney for Petitioner.

Ben M. Harrison

BEN M. HARRISON
Assistant Attorney General